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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY MATA, Defendant and Appellant.	B277734 (Los Angeles County Super. Ct. No. KA101342)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed and remanded.

Mary Jo Strnad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, David E. Madeo and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Johnny Mata guilty of murdering a rival gang member and possessing a firearm as a felon. The trial court sentenced Mata to 86 years to life in prison, a sentence that included an enhancement for personally and intentionally discharging a firearm in committing the murder and an enhancement for having a prior serious felony conviction.

Mata argues his attorney provided ineffective assistance. We conclude otherwise and affirm his conviction, but we remand the case for the trial court to exercise its discretion under recent amendments to the Penal Code whether to strike the firearm enhancement and the prior serious felony conviction enhancement.

FACTUAL AND PROCEDURAL HISTORY

A. *The Shooting*

Shortly before midnight on December 23, 2010 David Deanda, Iliana Ortiz, Gabriel Chavez, and Louie Fraijo attended a party with approximately 20 people at a house in Baldwin Park. Ortiz stayed at the party for a while, drinking shots of tequila. When she decided to leave, Deanda walked her out.

After Ortiz and Deanda went outside, a person walking on the street approached the house, and Deanda asked, "Where you from?" The person said, "Flores." Deanda said he was "Little Loco from East Side Bolen" and "Fuck Flores." As soon as Deanda identified himself, the person "started shooting." Deanda ducked to the floor, but when he saw Ortiz was still standing, "frozen," he stood up again to push her to the floor. When Deanda stood up, the bullets hit him. Ortiz saw blood "all over" and screamed for someone to call 911. After firing multiple shots, the shooter "jumped in the car and took off." Deanda died from

five gunshot wounds. The police recovered 12 casings at the scene.

B. *The Investigation*

Detective Richard Lopez conducted the investigation of Deanda's murder. Detective Lopez interviewed Ortiz, who gave a description of the shooter and worked with a sketch artist to produce a drawing. Detective Lopez also interviewed Chavez, who was "right behind" Deanda as Deanda walked out of the house on the night of the shooting. Neither Ortiz nor Chavez could identify the shooter from photographic line ups. The murder was unsolved for a year and a half.

In June 2012 Christina Montenegro, one of Mata's former girlfriends, contacted the police with information about the murder. Detective Lopez interviewed Montenegro and learned from her that Mata was the shooter and that Jesus Lule was the driver of the getaway car. Detective Lopez interviewed Lule, who corroborated the information from Montenegro.

C. *The Charges and the First Trial*

The People charged Mata with first degree murder (Pen. Code, § 187, subd. (a)),[1] and possession of a firearm by a felon (§ 12021, subd. (a)(1), now § 29800, subd. (a)(1)). The People alleged Mata committed the murder for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b), and that Mata personally and intentionally discharged a firearm causing great bodily injury or death, within the meaning of section 12022.53, subdivision (d). The People also

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[1] Undesignated statutory references are to the Penal Code.

alleged as to both counts that Mata had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and that for this conviction Mata served a prison term within the meaning of section 667.5, subdivision (b).

At the time the People filed the charges in connection with the 2010 murder of Deanda, Mata was awaiting trial in another case on a charge of attempted murder of Montenegro's previous boyfriend, Timmy Saldana, arising out of an unrelated incident in 2012. The trial court granted the People's motion to consolidate the two cases. In 2015 a jury found Mata guilty of the attempted murder of Saldana,[2] but could not reach a verdict on the murder of Deanda, hanging seven to five for acquittal. The trial court declared a mistrial on the murder charge and reset the case for a retrial.

D. *The Retrial*

At the retrial on the murder charge, the People presented the testimony of a gang expert, Detective Ralph Batres, who explained that El Monte Flores was a criminal street gang claiming the City of El Monte as its territory. Detective Batres also explained that East Side Bolen was a rival street gang claiming the City of Baldwin Park as its territory. Detective Batres testified that photographs of Mata showed he had tattoos symbolizing his allegiance to the El Monte Flores gang, including the letters "EMF" in several places on Mata's body and the words "EM Flores" on his chest.

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[2] Mata appealed his conviction for attempted murder in case No. B270264. On March 26, 2018 we conditionally reversed the conviction and remanded the case with directions.

Christina Montenegro testified she grew up in Baldwin Park and began dating Mata in September 2011. Sometime in 2012 Montenegro heard Jesus Lule, whom she met through Mata, claim that he and Mata had shot someone. Montenegro asked Mata about the shooting, and Mata recounted the details. Mata told Montenegro that he shot Deanda, also known as "Little Loco," on Francisquito Street, that Lule drove the getaway car, that prior to the shooting they saw some people from East Side Bolen on the street, and that Mata said he wanted to "get that fool" because of an "incident" involving Deanda and Mata's brother. Mata told Montenegro that Deanda "had juice" and that "whoever killed somebody with juice, . . . would be a bad mother fucker." Mata told Montenegro that Mata got out of the car after Lule parked in front of a church and that Deanda "hit him up first" by asking Mata where he was from. Mata told Montenegro that he replied "Flores" and shot Deanda. Mata said he heard a girl screaming as he ran back to the car, and Lule drove him away.

Jesus Lule testified that on the night of December 23, 2010 he attended a Christmas party with his girlfriend Sara Boles where saw Mata. Sometime after midnight, in the early hours of December 24, 2010, Lule and Mata left the Christmas party to buy some beer. Lule testified that, before Mata got into his car, a blue Honda Accord, Mata put on a black hooded sweater. Mata told Lule to drive across town to Francisquito Street. Mata directed Lule to drive up and down the street and then stop near a church. When Lule stopped the car, Mata got out and walked toward the church, and Lule lost sight of him. Lule heard "a lot of" gunshots and saw Mata running into the street. When Mata got into the car, Lule saw Mata had a gun.

Ortiz testified she saw the person who shot Deanda. She described the shooter as "slim" and "tall" with a "distinctive jaw"

and a "bald" or "shaved head." Ortiz said the shooter had "pronounced cheekbones" and "didn't look stocky." The prosecutor introduced into evidence a sketch of the shooter based on Ortiz's description.

Chavez denied making any statements about what he had witnessed in the shooting. To impeach Chavez, the prosecutor introduced an audio recording and a transcript of Chavez's interview with Detective Lopez. In that interview, Chavez stated that prior to shooting the shooter said "EMF" and "Flores." Chavez described the shooter as a six foot tall "real stocky dude," "light-skinned," with "a big head" that was "balding." Chavez stated that the site of the shooting was a house where members of East Side Bolen congregated. Chavez described the incident: "This fool walked up . . . we . . . banged on him, he said his hood, we said it's our hood. We said fuck his hood and then [he] pulled out quick and done and dumped and left." When Detective Lopez showed Chavez a photographic line up of suspects that included a photo of Mata, Chavez circled a photograph of someone else.

Fraijo also denied making any statements about the shooting. To impeach Fraijo, the prosecutor introduced an audio recording and transcript of Detective Lopez's interview of Fraijo. In the interview, Fraijo stated Chavez told him the shooter was a "tall," "light-complected guy" who was "wearing a t-shirt." The shooter did not have facial hair or tattoos. Fraijo stated Chavez told him the shooter said "Flores," Deanda said, "Fuck Flores," and the shooter started shooting.

Ernest Olagues, Deanda's cousin, testified that, early in the morning on December 24, 2010, he parked his car in front of the house on Francisquito Street to get some rest. Olagues heard another car park in front of him. He heard someone get out of the car in front of the driveway and walk up the driveway. Olagues then heard gunfire from the front of the house. Olagues

saw a "tall and slender" person wearing a black hoodie and baseball cap run down the sidewalk with a gun in his right hand. A dark Honda Accord drove next to the person along the sidewalk, and Olagues assumed the person got into the car before he saw the car "take off."

Officer Andrew Mora testified he stopped Mata in February 2011, and Mata admitted his membership in the El Monte Flores gang. Officer Mora testified that Mata, as he appeared in court, did not look the same as the person the officer stopped in 2011. The prosecutor introduced a photograph of Mata taken in 2009, a photograph of Mata taken in 2011 when Officer Mora stopped him, and a Department of Motor Vehicles record indicating Mata's height was six feet one inch.

E. *The Verdict and the Sentence*

The jury found Mata guilty of first degree murder and of possession of a firearm by a felon.[3] The jury also found true the gang allegation under section 186.22, subdivision (b), and the firearm allegation under section 12022.53, subdivision (d). In a bifurcated proceeding, Mata admitted and the court found true the allegation Mata had suffered a prior conviction for a felony, the felony was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12). The court also found Mata had served a prison term for a felony within the meaning of section 667.5, subdivision (b).

The trial court sentenced Mata to prison for a term of 86 years to life. Mata's sentence consisted of 25 years to life for the murder conviction, doubled under the three strikes law, plus 25 years to life for the firearm enhancement, five years for the

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[3] Mata stipulated he had been convicted of a felony.

enhancement under section 667, subdivision (a), and six years for the conviction for possession of a firearm by a felon. The court did not impose or strike the enhancement under section 667.5, subdivision (b). Mata timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

"A criminal defendant's federal and state constitutional rights to counsel [citations] includes the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) "'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1051; accord *People v. Blessett* (2018) 22 Cal.App.5th 903, 942, review granted Aug. 8, 2018, S249250.) "The defendant has the burden on appeal to show by a preponderance of the evidence that he or she was denied effective assistance of counsel and is entitled to relief." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 80.)

"When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009; see *People v. Weaver* (2001) 26 Cal.4th 876,

928 [“‘even “debatable trial tactics” do not “constitute a deprivation of the effective assistance of counsel”’”]; *People v. Pettie*, *supra*, 16 Cal.App.5th at p. 81 [“‘“[t]actical errors are generally not deemed reversible”’”]; see also *Harrington v. Richter* (2011) 562 U.S. 86, 105 [“[t]he question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom”]; *Yarborough v. Gentry* (2003) 540 U.S. 1, 8 [“[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight”].) “On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*People v. Mai*, at p. 1009; see *People v. Torres* (2018) 25 Cal.App.5th 162, 171.)

B. *Mata Has Not Demonstrated His Trial Counsel Provided Ineffective Assistance*

1. *Trial Counsel’s Failure To Ask Ortiz To Identify Mata Was Not Ineffective Assistance*

Mata contends his trial counsel, Antonio Bestard, was ineffective because he did not introduce evidence that Ortiz could not identify Mata in court and was unable to identify Mata as the shooter in two photographic line ups. Mata argues that, because Bestard “advance[d] the defense that [Ortiz’s] identification of the shooter [did] not match [Mata],” there was “no reason . . . not to

have place[d] the strongest evidence in support of that theory before the jury."

Bestard had a tactical reason, however, for not asking Ortiz whether she could make an in-court identification or about her prior inability to identify Mata as the shooter. As Bestard explained during a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118,[4] he did not want to ask Ortiz whether she could identify Mata as the shooter because the defense already had the sketch artist's drawing based on Ortiz's description that showed the shooter had "a high cheek bone" and was "a skinny person," whereas Montenegro and Lule described Mata as "fat," and booking photos of Mata showed him as "stockier." Bestard stated, "I did specifically ask [Ortiz] whether [Mata] was stocky or fat. She said 'no.'" Bestard's strategy to rely on the sketch of the shooter was reasonable because the sketch depicted someone who did not look like Mata. Had Bestard asked Ortiz in court additional questions about the shooter's appearance, he would have risked that Ortiz, upon reflection, may have identified Mata. In fact, in the first trial Ortiz expressed uncertainty when asked whether she recognized Mata in court: "It's like, I feel like I do, but then I don't. If he would have been thinner . . . ." It was a rational tactical decision for Bestard not to take that risk when he had already a description that favored Mata's defense.

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[4] A *Marsden* hearing allows a criminal defendant to seek substitution of court-appointed counsel if the record shows ""'appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."'" (*People v. Zendejas* (2016) 247 Cal.App.4th 1098, 1108.)

Bestard had a similar tactical reason for not asking Ortiz about the two photographic line ups. In the first trial, Ortiz testified the pictures in the first line up were "kind of blurry." Thus, evidence of Ortiz's pretrial failure to identify the shooter from the first line up would not have carried much weight, whereas had Bestard asked Ortiz at trial to look again at the photographic line up, Ortiz, upon closer examination, may have been able to identify Mata. Regarding the second photographic line up, although Ortiz focused on a photograph of someone other than Mata, she testified she remembered the shooter "had a big nose," a description that corresponds to how Mata on appeal describes his nose ("fleshy and rounded").

Mata argues Bestard's trial tactics compare unfavorably with those of his attorney in the first trial, Alex Kessel. Mata, however, does not cite any authority for the proposition the court should use another attorney's trial strategy as the benchmark for assessing whether the performance of his trial counsel in this case was ineffective. To the contrary, the test is whether Bestard's performance "fell below an objective standard of reasonableness under prevailing professional norms" (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009), not how his performance compared to another attorney. Indeed, "'[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" (*People v. Duncan* (1991) 53 Cal.3d 955, 966; see *People v. Ledesma* (1987) 43 Cal.3d 171, 216 ["the means of providing effective assistance are many"]; *Carillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1530 [same]; *People v. Wallin* (1981) 124 Cal.App.3d 479, 485 ["[e]ven the most competent counsel may . . . conduct himself in a manner which might be

criticized by other equally competent counsel but that is not the measure of competency of counsel on review by an appellate court"].)

In addition, Mata has not shown prejudice. The prosecutor presented evidence Mata began to change his appearance after the 2010 shooting, including Officer Mora's testimony that Mata looked different in court than he did in February 2011, three months after the shooting. Therefore, even if Ortiz had testified that Mata, as he appeared in the courtroom, did not look like the shooter or that she had been unable to identify Mata in a photographic line up, there was evidence Mata changed his appearance after the shooting. Finally, notwithstanding Ortiz's difficulty in identifying Mata, there was overwhelming evidence Mata shot Deanda: Montenegro's testimony Mata was the shooter, Lule's testimony linking Mata to the shooting, Olagues's testimony connecting the getaway car to Lule, and Chavez's testimony the shooter said the gang name Mata had tattooed on his body. Given the overwhelming evidence of Mata's guilt, there is no reasonable probability Ortiz's failure to make an in-court identification or evidence of Ortiz's inability to pick Mata out from blurry photographic line ups would have produced a different outcome. (See *People v. Mai, supra*, 57 Cal.4th at p. 1009; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1408 [defendant could not establish that errors by his trial counsel prejudiced him because there was "abundant evidence of [his] guilt"]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935 ["although another lawyer might have used different tactics, it is not reasonably probable a more favorable verdict would have resulted" because "overwhelming evidence" supported the conviction].)

2. *Trial Counsel's Impeachment of Montenegro Was Not Ineffective Assistance*

Mata contends Bestard was ineffective because he did not impeach Montenegro with evidence that her decision to provide law enforcement with information inculpating Mata was motivated by anger and jealousy. Mata also argues Bestard should have used the transcript of the first trial to show that Montenegro sought to negotiate a reduced sentence on her attempted murder charge in exchange for her testimony against Mata. Finally, Mata argues Bestard failed to introduce evidence Montenegro lied when she denied knowing any details of the murder before Mata told her about it. The record does not support Mata's arguments.

a. *Montenegro's Anger and Jealousy*

Mata contends "[i]mpeaching [Montenegro's] credibility and exposing her motives for accusing [Mata] were crucial for the defense." Mata argues Kessel impeached Montenegro with evidence showing "the only reason why she [was] coming forward [was] because she learned that [Mata] was seeing two other women while with her." Bestard, however, did the same thing. Bestard used the transcript from the first trial to show that Montenegro learned about Mata's infidelity shortly before she decided to contact the police and was upset she was in custody for a crime Mata committed while dating other women, but would have "written out whatever [Mata] told [her]" if she had not known of Mata's relationships with other women.

Although Bestard used different parts of Montenegro's testimony than Kessel did, Bestard achieved the same result. (See *People v. Mai*, *supra*, 57 Cal.4th at p. 1018 ["'[s]uch matters as . . . the manner of cross-examination are within counsel's discretion and rarely implicate ineffective assistance of counsel'"];

People v. Bolin (1998) 18 Cal.4th 297, 334 ["'[a]s to whether certain witnesses should have been more rigorously cross-examined, such matters are normally left to counsel's discretion and rarely implicate inadequacy of representation'"].) Bestard used the evidence to expose Montenegro's motives for implicating Mata in Deanda's shooting. Mata has not shown Bestard's performance in impeaching Montenegro fell below an "objective standard of reasonableness." (*People v. Mai*, at p. 1009).

b. *Montenegro's Attempt To Obtain a Reduced Sentence*

Mata argues Bestard negligently refrained from asking Montenegro about her efforts to bargain with Detective Lopez for leniency. The record shows, however, Bestard had a "rational tactical purpose" (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009) for not asking those questions. In the first trial, Mata faced charges for the murder of Deanda *and* for the attempted murder of Saldana. Thus, the jury in the first trial heard evidence Montenegro had been charged in the Saldana attempted murder charge, as well as Mata's involvement in that crime. Kessel could question Montenegro freely about her efforts to negotiate a reduced sentence in exchange for favorable testimony without Kessel having to worry about introducing evidence of Mata's involvement in the attempted murder of Saldana because the jury was hearing that evidence anyway.

At the time of the retrial, however, Mata had been convicted of the attempted murder of Saldana, and Bestard had a good reason not to introduce any evidence of the Saldana incident: Evidence that Mata had been convicted of attempting to murder Saldana, a member of the East Side Bolen gang, would have prejudiced Mata's defense to the charge of murdering Deanda, also a member of the East Side Bolen gang. When

Bestard started to ask Montenegro about her efforts to negotiate with Detective Lopez in her "other case," the prosecutor objected. The prosecutor stated that, if Bestard attempted to impeach Montenegro with the "circumstances of that crime," he was entitled to ask Montenegro "exactly . . . what the circumstances [were]," and if Bestard referred to the attempted murder charge, the prosecutor would "start seeking implication of Mr. Mata." The trial court warned Bestard his questioning was "perilously close to opening the door" and cautioned him to "be careful." Bestard made a very rational decision to avoid further questions about Montenegro's attempted murder charge, which would have risked introducing evidence that a jury had convicted Mata of that crime. (See *People v. Mickel* (2016) 2 Cal.5th 181, 198 ["a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had 'no rational tactical purpose' for an action or omission"].)

c. *Rumors About Deanda's Murder*

Montenegro testified she heard about Deanda's murder because she lived in Baldwin Park, but before she met Mata she did not know the details. Bestard sought to impeach Montenegro by asking her about the "rumor on the street" regarding Deanda's murder, but the prosecutor objected the question called for hearsay. When asked for the relevancy of the testimony, Bestard replied, "The relevancy is when she told Detective Lopez. . . . That's information that she had, that she gave to Detective Lopez." The trial court sustained the prosecutor's objection. Mata argues Bestard should have followed Kessel's cross-examination script and argued to the court that he wanted

to elicit Montenegro's "universe of knowledge" to show "what information she had received and related to law enforcement."

Mata's argument that Bestard's failure to prevail on this evidentiary issue was deficient performance is based on a misreading of the record. In the first trial, the court sustained the prosecutor's hearsay objection when Kessel stated he wanted to elicit Montenegro's "universe of facts." When Kessel explained he wanted to show that, "before [Montenegro] even met [Mata], she learned the facts" of Deanda's murder, the trial court again sustained the prosecutor's hearsay objection. Kessel finally argued he wanted to ask Montenegro what facts that "she relayed" to law enforcement. The trial court permitted the question, but admonished the jurors to consider the answer "in terms of what information she had received and related to law enforcement." Contrary to Mata's assertion, Bestard made the same argument Kessel made, and used words paraphrased from the trial court's evidentiary ruling in the first trial. The record suggests that, far from demonstrating an "obvious lack of familiarity with [the] evidence," Bestard memorized the trial court's limiting instruction from the first trial and used it to make in his argument to the court.

Moreover, Mata has not demonstrated prejudice. Even if Bestard had managed to convince the court to overrule the prosecutor's objection, the specific details of the rumors surrounding Deanda's murder would not have materially added to the evidence the jury already heard: Montenegro had general knowledge about Deanda's murder before Mata told her the details. That evidence provided the basis for Bestard to argue to the jury Montenegro fabricated Mata's confession, but the jury

found otherwise. Mata has not shown how additional details of rumors in the community would have altered the jury's verdict.

3. *Trial Counsel's Failure To Call Julia McCormick Was Not Ineffective Assistance*

Mata argues Bestard should have called Julia McCormick to authenticate a photograph she took of Mata on December 23, 2010. McCormick testified in the first trial she hosted a party on December 23, 2010, and a photograph taken at the party at approximately 11:22 p.m. showed Mata wearing shorts and a jersey of a professional football team in western Pennsylvania. Mata argues McCormick's photograph would have shown the contrast between how he appeared the night of the shooting and Ortiz's description of the shooter. Mata also argues McCormick would have corroborated Boles's testimony that Lule never left the party and that, if Lule had left to buy beer, it would only have taken him 10 minutes to go to the nearest convenience store.[5]

Bestard, however, may have reasonably decided that calling McCormick would hurt Mata's defense. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 989 ["[t]he decision whether to call certain witnesses is a 'matter[ ] of trial tactics and strategy which a reviewing court generally may not second-guess'"].) Although Ortiz and Olagues described the shooter as "thin" and

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[5] Boles testified she and Lule attended the December 23, 2010 party at McCormick's house. Boles and Lule arrived at approximately 10:00 p.m. and left at 3:00 or 4:00 a.m. the next morning. Boles said she did not see Lule leave the party that night, although she admitted he may have left to buy beer shortly before "closing time" at 2:00 a.m. She said that, if Lule had left to buy beer, he would have returned 10 minutes later because the convenience store was just "around the corner."

"tall," Chavez described the shooter as "stocky," a description that matched Mata's physique. Therefore, any photos McCormick took of Mata on December 23, 2010 showing Mata as "stocky" instead of "thin" would have bolstered the prosecution's evidence that some eyewitnesses described the shooter as "stocky." Moreover, although McCormick testified she did not ask anyone to get beer and she did not recall Mata ever leaving the party, the party lasted approximately 16 hours into the next day, and McCormick admitted she was not with Mata or looking at Mata the entire time he was at the party.

4. *Trial Counsel's Failure To Present Evidence Detective Lopez Pressured Lule To Make Statements Was Not Ineffective Assistance*

Mata asserts Bestard failed to present evidence Detective Lopez obtained Lule's statement by using ruses and other inappropriate interrogation techniques and by denying Lule an opportunity to consult with an attorney when he invoked his right to counsel. Contrary to Mata's assertion, however, Bestard did cross-examine Lule about whether he felt pressured to make a statement when Detective Lopez interviewed him. When Lule testified he did not feel pressured, Bestard impeached him with the transcript from the first trial, and Lule admitted he had previously testified he felt pressured by Detective Lopez.

Moreover, the prosecutor did not introduce Lule's statement into evidence, and Detective Lopez did not testify about the substance of his interview with Lule, stating only that Lule provided him the name of the shooter. Therefore, any evidence that Detective Lopez ignored Lule's requests for counsel during his interview to show Lule's statement was "unreliable"

would have been irrelevant because the jury never heard a recording of the statement. (See *People v. King* (2010) 183 Cal.App.4th 1281, 1305 [trial counsel was not ineffective for failing to raise an irrelevant issue].) Nor has Mata demonstrated prejudice. Lule testified at trial to the same key facts implicating Mata that he told Detective Lopez during his interview. Mata has not shown how evidence of any improper interrogation techniques would have made any difference in the outcome of the trial.

5. *Trial Counsel's Failure To Object to the Interviews of Chavez and Fraijo Was Not Ineffective Assistance*

Mata contends Bestard should have objected to the prosecutor playing the recordings of the interviews of Chavez and Fraijo because they contained statements that were inadmissible hearsay. The trial court, however, properly admitted the statements Chavez made in the recording as prior inconsistent statements after Chavez testified at trial contrary to the statements in his interview. Thus, a hearsay objection would have been futile. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616 ["[b]ecause there was no sound legal basis for objection" where "the evidence was admissible under the hearsay rule exception[ ] for inconsistent statements," trial counsel's "failure to object to the admission of the evidence cannot establish ineffective assistance"]; *People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1193 ["failure to object to the admission of evidence is not ineffective assistance where 'there was no sound legal basis for objection'"].)

Under Evidence Code section 1235, "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." "'"When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]'" [Citation.] Similarly, under the circumstances of a particular case, a witness's refusal to answer may be materially inconsistent with prior statements, exposing the witness to impeachment under Evidence Code section 1235." (*People v. Homick* (2012) 55 Cal.4th 816, 859.)

At trial, Chavez refused to answer the prosecutor's questions about the shooting. Chavez testified that he did not remember talking to Detective Lopez and that he did not tell Detective Lopez the shooter said "EMF" and "Flores." Chavez also denied giving Detective Lopez a description of the shooter. In his interview with Detective Lopez, however, Chavez identified several characteristics of the shooter, including the shooter's height (six feet), build (stocky), skin complexion (light), head size (large), lack of hair, and statements ("EMF" and "Flores"). His prior inconsistent statements were admissible under Evidence Code section 1235.

As for Fraijo's statements, at trial Fraijo denied telling Detective Lopez he had spoken to Chavez after the shooting, but he did not specifically deny Chavez told him the shooter said "Flores" and Deanda said "Fuck Flores." Thus, an objection to the prosecutor's introduction of Fraijo's interview, in which Fraijo repeated Chavez's description of the gang challenge, may not have been futile. (See *People v. Anderson* (2018) 5 Cal.5th 372,

403 [witness's double hearsay statement was admissible because "each level of hearsay came within an exception to the hearsay rule"]; *People v. Zapien* (1993) 4 Cal.4th 929, 952 [admission of multiple hearsay is permissible "where each hearsay level constitutes a prior inconsistent statement"].) Nevertheless, Bestard had a rational tactical reason for not objecting to the statements from Fraijo's interview (as well as those from Chavez's interview): Bestard planned to use the statements from both witnesses in his closing argument. Which in fact Bestard did when he argued Chavez and Fraijo did not identify Mata in their interviews with Detective Lopez. (See *People v. Lewis* (2001) 25 Cal.4th 610, 661 [no deficient performance where "counsel could reasonably have viewed the officer's testimony as further support for the defense position"]; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335 ["[t]he decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel"]; *In re Seaton* (2004) 34 Cal.4th 193, 200, fn. 3 ["[a]ttorneys often choose not to object for reasons that have no bearing on their competence as counsel"]; *People v. Majors* (1998) 18 Cal.4th 385, 403 [even where there is "a basis for objection, "'[w]hether to object to inadmissible evidence is a tactical decision'"']; *People v. Bona* (2017) 15 Cal.App.5th 511, 521 [""'[g]enerally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight'" and a "'"reviewing court will not second-guess trial counsel's reasonable tactical decisions"'"].)

6. *Trial Counsel's Failure To Recall Chavez Was Not Ineffective Assistance*

Mata contends Bestard should have recalled Chavez as a witness to question him about a comment he made as he was

leaving the courtroom after his testimony. The bailiff reported to the trial court that he heard Chavez say, "I don't know if it was him or not." The trial court learned some of the jurors may have heard the remark, and after an inquiry, informed the parties five jurors had heard Chavez say "something to the extent, That's not him." The trial court admonished the jury not to consider any statements Chavez made after he stepped down from the witness stand. Bestard initially told the trial court Mata wanted to recall Chavez, but after conferring with Mata, counsel stated, "We would like not to call him." The trial court asked counsel whether the decision was "a strategic decision that the defense [was] making." Bestard replied, "Yes." In response to the court's question whether he agreed not to recall Chavez, Mata said, "Yes."

Because Mata agreed with Bestard's strategic decision, he cannot now argue that Bestard's performance was deficient. (See *People v. Brown* (2014) 59 Cal.4th 86, 111 [a defendant cannot claim ineffective assistance of counsel "'based on counsel's acts or omissions in conformance with the defendant's own requests'"]; *People v. Snow* (2003) 30 Cal.4th 43, 120 [same].) Moreover, Bestard may have reasonably decided that recalling Chavez would harm, rather than help, Mata's case. As discussed, throughout his testimony at trial, Chavez feigned memory lapses and denied he was present at the shooting. There is no reason to believe Chavez would have answered questions any differently, or even at all, had Bestard recalled him. Indeed, although the trial court instructed the jurors to disregard any comments by Chavez as he left the courtroom, recalling Chavez may have resulted in Chavez denying on the witness stand a statement Bestard hoped some of the jurors heard. (See *People v. Mickel*, *supra*, 2 Cal.5th

at p. 198 [reversal on direct appeal is warranted "only if there is affirmative evidence that counsel had 'no rational tactical purpose' for an action or omission"].)

Finally, Mata has not demonstrated prejudice. The jury already heard evidence Chavez did not identify Mata in a photographic line up. It was not reasonably probable that, had the jury heard an additional statement from Chavez that Mata was not the shooter (assuming Chavez decided to answer questions upon recall), the outcome would have been different.

7. *Mata Has Not Shown Cumulative Error*

Mata contends the "cumulative effect" of each instance of ineffective assistance "deprived [Mata] of a fair trial." Because we conclude Bestard's assistance was not ineffective, there is no cumulative effect or deprivation of a fair trial. (See *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["[h]aving found no ineffective assistance, we necessarily reject defendant's claim of cumulative error"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 435 [rejecting the contention that the "cumulative effect of counsel's errors and omissions amounted to ineffective assistance of counsel" where "counsel performed their task largely free of deficient performance, and certainly free of any lapse of constitutional dimension"].)

C. *The Trial Court Should Have an Opportunity To Exercise Its Discretion Whether To Strike the Firearm Use and the Prior Serious Felony Enhancements*

When the trial court sentenced Mata, section 12022.53, subdivision (h), prohibited the court from striking the firearm enhancement under that statute. (See *People v. Gonzalez* (2008)

43 Cal.4th 1118, 1127; *People v. Palacios* (2007) 41 Cal.4th 720, 726; *People v. Sinclair* (2008) 166 Cal.App.4th 848, 853.) The Legislature, however, has since amended section 12022.53, subdivision (h), to give the trial court discretion to strike firearm enhancements in the interest of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 1.) Mata argues, the People concede, and we agree that section 12022.53, subdivision (h), as amended, applies to Mata. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.)

Similarly, when the trial court sentenced Mata, section 667, subdivision (a), prohibited the court from striking the five-year enhancement under that statute. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The Legislature, however, has since amended sections 667 and 1385, effective January 1, 2019, to give the trial court discretion to dismiss, in the interest of justice, a five-year sentence enhancement under section 667, subdivision (a). (See Cal. Const., art. IV, § 8, subd. (c)(1); *People v. Garcia*, at p. 973.) Mata argues, the People concede, and we agree the new provisions will apply to defendants, like Mata, whose appeals will not be final on the law's effective date. (See *People v. Conley* (2016) 63 Cal.4th 646, 656 [where a statutory amendment reduces punishment, in the absence of any textual indication of the Legislature's intent, "we infer[ ] that the Legislature must have intended for the new penalties, rather than the old, to apply"]; *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date," fn. omitted];

People v. Garcia, at p. 973 ["the Legislature intended [the amendments to section 667, subdivision (a)] to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [the amendment] becomes effective on January 1, 2019"].)

The People argue remand to allow the trial court to exercise discretion under the amendment to section 12022.53, subdivision (a), is unnecessary "because the record shows the trial court would not have exercised discretion to strike the firearm enhancements." The People similarly argue remand to allow the trial court to exercise discretion under the amendments to sections 667 and 1385 is "unwarranted" because "the trial court's statements at sentencing clearly indicated that it would not have dismissed the enhancement in any event."

The record does not support the People's arguments. Although the trial court rebuked Mata for the "choices [he] made" and told Mata "you're going to prison for the rest of your life," the court did not express an intent to impose the maximum possible sentence. In addition, when imposing the enhancement under section 12022.53, the trial court stated it was doing so "by virtue of the personal use of a firearm," which suggests the court imposed the enhancement because the law required its imposition. The trial court did not state with respect to either enhancement that, even if the court had the discretion, it would not have exercised it. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 ["a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement"]; see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

Moreover, defendants are entitled to "'"sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.'" (*People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1480; see *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1081; *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; see also *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263 [where the "trial court mistakenly believed that it had no discretion to impose concurrent sentences," the Court of Appeal remanded the case to allow the trial court to exercise discretion].) The trial court should have an opportunity under the amended statutes to strike the enhancement of 25 years to life under section 12022.53, subdivision (d), for firearm use causing great bodily injury or death and the enhancement of five years under section 667, subdivision (a), for Mata's prior serious felony conviction.[6]

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[6] Citing *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, the People argue a sentencing court must consider "'*the interests of society represented by the People* in determining whether there should be a dismissal,'" and the trial court here indicated "it would not be in the interest of society to reduce [Mata's] punishment for any reason." The trial court, however, did not go that far. As discussed, the trial court delivered sobering words to Mata, but the court did not state society would be better off by incarcerating Mata for as long as possible. Moreover, the Supreme Court's statement in *Romero* regarding "the interests of society" concerned appellate review of a trial court's exercise of discretion under section 1385. (*Romero*, at pp. 530-531.) In this case, the trial court has not yet exercised that discretion.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The matter is remanded to allow the trial court to exercise its discretion, after January 1, 2019, whether to strike the enhancements under sections 12022.53, subdivision (h), 667, subdivision (a), and 1385.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.